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GENERAL COUNSEL  
OF COPYRIGHT

DEC 29 1997

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In re: )  
Mechanical and Digital Phonorecord ) No. 96-4  
Delivery Rate Adjustment Proceeding ) CARP DPRA  
\_\_\_\_\_)

**COMMENTS AND NOTICE OF  
INTENT TO PARTICIPATE  
OF THE COALITION OF INTERNET WEBCASTERS**

Pursuant to the Federal Register Notice of Proposed Rulemaking in the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 62 Fed. Reg. 63506 (December 1, 1997) (hereinafter "NPRM"), the Coalition of Internet Webcasters (hereinafter, the "CIW" or "the Coalition") hereby submits the following comments objecting to certain terms in the proposed terms and rates set forth in the NPRM, and gives notice of its intent to participate in any proceeding of the Copyright Arbitration Royalty Panel in this matter.

The companies constituting CIW are engaged in the transmission via telecommunications facilities, including the Internet, of audio and audiovisual material, including copyrighted sound recordings; and companies engaged in the manufacture of software tools that enable such transmissions to be efficiently transmitted and performed using personal computers and related electronic equipment. The members of CIW currently include:

-- AudioNet, Inc. (at <http://www.audionet.com>), an Internet webcaster that transmits audio and video content to hundreds of thousands of users each day. AudioNet's program offerings include, inter alia, original programming, live broadcasts of the signals of more than 275 radio stations, and the AudioNet Jukebox which allows the user to select and listen to music from more than 2,000 compact discs of a wide spectrum of music.

-- RealNetworks, Inc. (at <http://www.real.com>), a pioneer in the development and marketing of software products and services designed to enable users of personal computers and other digital devices to send and receive real-time media over the Internet and other digital broadband networks. In 1995, RealNetworks introduced the RealAudio software for delivery of audio and, in 1997, the RealPlayer software for delivery of audio and audiovisual content.

-- Terraflex Data Systems, Inc., an Internet-exclusive webcaster that publicly performs continuous, originally programmed audio music channels to thousands of daily listeners over the Internet, through its service known as "TheDJ" (at <http://www.thedj.com>) . TheDJ transmits over the Internet public performances of audio content from more than 20,000 compact discs encompassing a wide spectrum of music.

The method commonly used to effectuate these transmissions is known generically as "streaming media" technology. In the early days of transmissions of sound recordings via the Internet (i.e., about two years ago), in order for an Internet user to hear sound recordings delivered via the Internet, the user was required first to download an entire audio file. Transmission of these files, often constituting several megabytes of data, consumed long periods of time, was inefficient for the transmitter, and wasteful for the recipient who had to store for more than a transitory period a copy of the large audio file on a hard drive or other medium. Importantly, the storage of audio files on user equipment potentially was detrimental to the interests of copyright owners.

Streaming media technology addressed all of these concerns. Using streaming media technology, audio data is transmitted to the user in a manner that allows the user to hear the transmitted material in real time. Rather than downloading the entire file, the user's computer stores at any given time only a very small portion of the audio file, encoded in a data format that can be used only with streaming media software. This small encoded data segment is stored in a temporary "buffer" in the random access memory of the user's computer system, so that the data can be processed (e.g., sequentially reorganizing data packets received in a disjointed manner and decoding the packets for playback). As the data segment leaves the computer memory buffer, it is replaced by incoming packets containing additional small portions of the sound recording. The result is that the user hears a continuous stream of sound, yet the user's computer has only stored a minute portion of the sound recording at any given time, for a very transitory period, in a manner that otherwise is inaccessible to (and unusable by) the typical computer user.

This streaming audio technology serves the interests of all parties. Internet users no longer have to endure long waits before listening to sound files. Internet websites can efficiently deliver wide varieties of high-impact content. And, because the user no longer copies audio files in their entirety, copyright owners' interests are protected against casual copying and redistribution.

The value of streaming media transmission to the Internet and the public is evident from the explosion of audio-visual content on the World Wide Web. While it is impossible to quantify the usage of streaming media technology on the Internet, thousands of websites currently offer hundreds of thousands of hours of programming using streaming media technology. Software that plays streaming media transmissions now is distributed as a "plug-in" with popular Internet browsers such as Netscape Navigator or Microsoft Internet Explorer. Beyond question, the ready availability of audio-visual content via streaming media technology has been a significant force

impelling the growth of the Internet to its estimated more than 20 million users in the United States alone.

The benefits of this technology to all parties, however, are threatened by the vague and open-ended regulations proposed in the NPRM. The NPRM proposes regulations governing an amorphous and potentially open-ended category of digital phonorecord delivery ("DPD") known as "incidental" digital phonorecord deliveries, and a narrower subcategory of "transient" incidental digital phonorecord deliveries. See proposed regulation § 255.6.

As an initial matter, the regulations as currently drafted squarely present controversial questions such as the application of copyright law to temporary copies made in computer memory in the course of transmission and performance, and secondary liability for the transmission of infringing copies. The regulations effectively take sides in long-standing and heated debates over legal and technological policy that are better left for resolution by Congress than the Copyright Office or a CARP. In this regard, the Coalition notes that ongoing legislative efforts before both the House and the Senate seek to explore these hot-button issues in a fair and open process intended to balance all parties' interests. The Coalition objects to this attempt by the Recording Industry Association of America ("RIAA") and the National Music Publishers Association ("NMPA"), in a private agreement, to do an end run around that debate and to resolve a subset of these controversial issues in their own favor -- against the broader interests of the public and other industries.

The Coalition submits that the types of activities in which they are engaged are beyond the reach of the amendments to 17 U.S.C. § 115 effectuated by the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRSRA") relating to DPDs. As the legislative history makes clear, the DPRSRA was intended to "maintain and reaffirm" mechanical rights of songwriters, not to expand them beyond recognition. S. Rep. No. 104-128 at 37. "The intention [behind the amendments to section 115] is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers." Id. By expansively defining "digital phonorecord delivery" so as to encompass temporary copying occurring in the course of a *performance*, the regulations eviscerate the clear distinctions that Congress intended to retain between mechanical and performance rights.

The Coalition thus objects to the overly broad categories of DPDs defined in § 255.6(a) and (b). Temporary copies made in the course of transmission or in computer memory are not "specifically identifiable reproductions" within the meaning of 17 U.S.C. § 115. They are not "specific" or "identifiable" in any sense. The copies constitute packetized representations of insubstantial portions of a sound recording, made solely to facilitate transmission or performance. They are not intended to be stored such that the recipient could perform the sound recording more than once, nor are they capable of such repeat performances. The copying is initiated by technical facilities such as software, rather than by direct human intervention and action, and so are not directed to specific

places in particular storage media by human intervention and action. They generally are not "identifiable" in the sense that one cannot readily find and retrieve such temporary copy from a particular and identifiable location; they are there only for purposes of performance using the streaming audio software. In that respect, such temporary copying also is subject to limitations and exceptions under the Copyright Act, such as the fair use provisions of 17 U.S.C. § 107.

Indeed, the Coalition questions whether all "incidental DPDs" or "transient phonorecords" as defined in the NPRM, may be "fixed" under 17 U.S.C. § 101. Without such fixation, the temporary copies do not constitute "phonorecords" under 17 U.S.C. § 101 and, consequently, DPDs under 17 U.S.C. § 115(d).

In these regards, the Coalition respectfully submits, the activities involved in the delivery of streaming media to the user -- the making of temporary copies that enable transmission and performance -- are beyond the scope of the statute and, hence, beyond the regulatory authority of the Copyright Office. Consequently, these technologies should be declared to be outside the reach of section 115 by the Copyright Office, in a manner that does not require intervention of or resolution by a CARP. Sections 255.6(a) and (b) simply should be stricken from the regulations.

Should the Office nevertheless determine that it is necessary to refer these objections to a CARP, the Coalition has the following more specific comments regarding the proposed regulations.

Section 255.6(a) creates a category of "incidental" digital phonorecord deliveries, yet fails to define any elements of what does or does not constitute such DPDs. The open-ended nature of this regulation potentially means that any and every temporary reproduction of any portion of a phonorecord, that is interactively delivered solely for the purpose of performance, and without any knowledge of or intention to cause the reproduction or storage of the entire work, nonetheless may be required to comply with the requirements of the compulsory license provisions under Section 115 of the Copyright Act. Moreover, the proposed regulation provides that the definition of such incidental DPDs may change over time, creating an uncertain scope of liability for companies engaged in Internet webcasting. Section 255.6(a) also provides that the same "Physical Rate" royalties should be imposed for incidental deliveries as for DPDs that are specifically intended to result in the delivery of a permanent phonorecord. Further, it raises the unfair and unjustified possibility that a copyright owner might receive one or more royalty payments for incidental "DPDs" in addition to remuneration for the performance of the sound recording.

Thus, the regulation creates a substantial threat that typical and established Internet practices and technologies will suddenly be rendered unlawful in the future, and that those involved in the chain of transmission will be subjected to financially crippling liability. The Coalition submits that any incidental copying in the course of encoding, transmission and performance are and should be exempt from the definition of DPDs and

from any liability under Section 115. Even if they are not exempt, they should be exempted from payment of any royalties under Section 115.

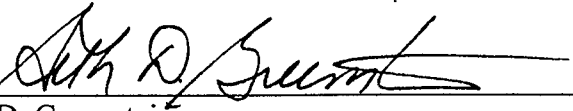
Section 255.6(b) raises several similar problems. First, it carries the specter of secondary infringement liability for those conduits that transmit sound recordings over the network. To the extent that transient copying occurs in the ordinary course of telecommunication of audio data over the Internet, Section 255.6(b) states that no royalties shall be paid upon such transient copies – but only "provided that a royalty shall be payable with respect to each work embodied in the phonorecord ultimately reproduced by or for the ultimate transmission recipient...." Liability of parties merely involved in the transmission of bits should not, as a matter of policy, depend on the actions of the persons initiating or sending the transmissions. Second, providing now for a zero royalty rate, rather than completely exempting such transmissions, creates the risk that the regulation could be amended at some point in the future to provide for remuneration, thereby fundamentally altering the economic underpinnings of the workings of the Internet and the physical means of telecommunicating content. Third, the definition of "Transient Phonorecord" in Section 255.6(b) is narrowly restricted to temporary copying that occurs "solely to facilitate the transmission to the ultimate transmission recipient." The definition should more broadly apply to all reproductions in the course of transmission, including those made to facilitate performance of the sound recording by or for the transmission recipient.

Finally, Section 255.6(c) also is unnecessarily narrow. For the reasons same cited above with respect to (b), the current provision of a zero royalty portends the possibility that a royalty will, at some future date, be imposed. An exemption is warranted rather than a zero royalty. While the Coalition agrees with the creation of a safe harbor in the manner set forth in (c)(1), it is simply too rigid to limit the exception from liability only to clips of 30 seconds or less. Nothing inherently makes clips of 31 or 45 or 60 seconds, for example, prejudicial to the economic interests of songwriters or sound recording producers. The more important factor is the nature of the use of the clip. In this regard, the limitation to uses that are "incidental to the promotion" of the sound recording or work also may be too limited. The provision instead should apply to a broader range of purposes that would not be intended or otherwise tend to substitute for a DPD of the entire work.

WHEREFORE, the Coalition of Internet Webcasters objects to the terms and rates set forth in the NPRM, and gives notice of its intention to participate in any proceeding concerning these proposed regulations before a Copyright Arbitration Royalty Panel.

Respectfully submitted,

COALITION OF INTERNET WEBCASTERS

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## **Notices of Intent to Participate**

### **Docket No. 96-4 CARP DPRA**

1. Coalition of Internet Webcasters (filed 12/29/97)
2. United States Telephone Association (filed 12/30/97)
3. Broadcast Music Inc. (filed 1/16/98)
4. Recording Industry Association of America (filed 7/27/98)
5. National Music Publishers' Association, The Harry Fox Agency, Inc., the Songwriters Guild of America (filed 7/29/98)
6. American Federation of Television and Radio Artists (filed 7/29/98)
7. Digital Cable Radio Associates (filed 7/30/98)
8. America Online, Inc. (filed 7/30/98)
9. The American Society of Composers, Authors and Publishers (ASCAP) (filed 7/30/98)
10. SESAC, Inc. (filed 7/31/98)